



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2020/827

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2020/827 (Legislative Instrument)*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Summary

1. The Legislative Instrument is made under paragraph 907D(2)(a) of the *Corporations Act 2001* and amends the *ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844 (Principal Instrument)*. The purpose of the Principal Instrument is to provide transitional relief from certain reporting requirements under the *ASIC Derivative Transaction Rules (Reporting) 2013 (Rules)*, for varying periods, to Reporting Entities. Most of the conditional exemptions are due to expire or have ceased. The Legislative Instrument extends, modifies and updates some of these conditional exemptions and repeals some conditional exemptions that are expiring on 30 September 2020 or have previously expired.

Purpose of the instrument

2. The Rules impose reporting requirements in relation to OTC Derivatives on 'Reporting Entities.' Under Rule 2.2.1 of the Rules, 'Reporting Entities' are required to report information about their Derivative Transactions in 'OTC Derivatives' (referred to in the Rules as 'Reportable Transactions') in relation to OTC Derivatives, to a Licensed Repository or a Prescribed Repository. These requirements are referred to in the Rules as the 'Reporting Requirements.'
3. The Principal Instrument provides transitional relief from certain Reporting Requirements under the Rules, for varying periods, to Reporting Entities. The purpose of the Legislative Instrument is to amend the Principal Instrument to remove some elements of expired relief and to extend and update some elements of the existing relief under the Principal Instrument.
4. The Legislative Instrument also amends Exemption 1 in the Principal Instrument, by removing 'Relevant Financial Markets' as a category of financial markets for the purposes of the relief under Exemption 1 from Rule 2.2.1 of the Rules. Concurrently to this work, ASIC has undertaken an assessment of the financial markets that were identified in Exemption 1 as 'Relevant Financial

Markets’ and is amending the ASIC Regulated Foreign Markets Determination [OTC DET 13/1145] (**Determination Instrument**) to include those financial markets as a ‘Regulated Foreign Market’ where appropriate under Rule 1.2.4(3) of the Rules.

5. ‘Relevant Financial Markets’ for the purposes of Exemption 1 had been initially designed to supplement, on a time-limited basis, the Determination Instrument. The time-limited exemption applied while ASIC considered whether it was of the opinion that the specified financial markets were suitable to be determined as a ‘Regulated Foreign Market.’ Now that ASIC has undertaken this assessment and updated the Determination Instrument with additional financial markets categorised as ‘Regulated Foreign Markets’, the category of ‘Relevant Financial Markets’ is no longer required. The consequence of a financial market being determined by ASIC as a Regulated Foreign Market is that Derivatives entered into on the Regulated Foreign Market are not ‘OTC Derivatives’ under the Rules and do not need to be reported by Reporting Entities under the Rules.
6. Broadly, the Legislative Instrument extends and updates time-limited exemptive relief provided under the Principal Instrument as follows:
 - (a) extends and modifies conditional relief in section 5 of the Principal Instrument from Rule 2.2.1 of the Rules in relation to the reporting of Exchange-Traded Derivatives so that the relief continues until 30 September 2022, but does not include Derivatives traded or entered into on a Relevant Financial Market as the reference to ‘Relevant Financial Markets’ will be removed from 1 October 2020 for reasons given at paragraph 5 above (Exemption 1);
 - (b) extends conditional relief in section 7 of the Principal Instrument until 30 September 2022. Under this relief, Reporting Entities do not have to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report Name Information about an entity (referred to in the paragraph as a ‘Relevant Entity’) in relation to a Reportable Transaction or Reportable Position to a Trade Repository, in the case where the Reporting Entity reports to the Trade Repository an identifier for the Relevant Entity that is a Legal Entity Identifier (LEI), Interim entity identifier, Designated Business Identifier or Business Identifier Code (BIC Code). (Exemption 3); and
 - (c) extends conditional relief in section 13 of the Principal Instrument until 30 September 2022. Under this relief, a Reporting Entity does not need to comply with Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report a Reportable Transaction or Reportable position in a foreign exchange contract, the relief being limited to certain circumstances set out in paragraphs 13(a) and (b) of the Principal Instrument (Exemption 9).
7. In the interim, ASIC will further consider the need for the above exemptions as part of its review of the Rules.

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8. The Legislative Instrument also repeals time-limited exemptive relief in the Principal Instrument that is expiring or has expired in the following areas:
- (a) Section 8 - Exemption 4 (Privacy – Consent for historical counterparties): provided conditional relief from Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report identifying information for a Historic Reportable Position to a Trade Repository, in certain circumstances, including where there is a lack of express consent from the counterparty to which the identifying information relates that would lead to a breach of confidence or contractual duty owed by the Reporting Entity to the counterparty. The relief will be repealed when it is due to expire on 30 September 2020 because ASIC has identified that the exemption has limited use. ASIC could not identify any instances where a Reporting Entity relied on the exemption so the exemption is no longer required on a class basis;
 - (b) Section 9 - Exemption 5 (Privacy – Foreign privacy restrictions): provided conditional relief from Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report identifying information in relation to a Reportable Transaction or Reportable Position to a Trade Repository, where such reporting would breach a foreign law or regulation of a Relevant Foreign Jurisdiction. The relief will be repealed when it is due to expire on 30 September 2020 because ASIC has identified that only one entity relies on the exemption so the exemption is no longer required on a class basis;
 - (c) Section 10 - Exemption 6 (Privacy – Identifying information of Government Entities): provided conditional relief from Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report identifying information in relation to Government Entities where consent cannot be obtained. The relief will be repealed as it ceased on 30 September 2016; and
 - (d) Section 12 - Exemption 8 (Collateral reporting): provided conditional relief from subrules 2.2.1(1) or 2.2.2(1) of the Rules to the extent those subrules require the Reporting Entity to report certain Derivative Transaction Information and Derivative Position Information. The relief will be repealed as it ceased on 30 October 2015.
9. The Legislative Instrument also updates section 14 of the Principal Instrument in relation to the record keeping requirements for Reporting Entities to remove references to the repealed exemptions.

Consultation

10. In making this Legislative Instrument, ASIC underwent two rounds of consultations in May and September. ASIC consulted with the industry groups of the International Swaps and Derivatives Association, Global Financial Markets Association – Global Foreign Exchange Division and the Australian Financial Markets Association. ASIC also invited comments from the Association of Superannuation Funds of Australia, the Australian Institute of

Superannuation Trustees and the Financial Services Council. ASIC also wrote to the Australian licensed trade repositories, DTCC Data Repository (Singapore) Pte Ltd and Chicago Mercantile Exchange Inc, requesting that they bring this to the attention of their participants.

11. As part of these consultations, ASIC published the proposals regarding the exemptions, the draft Legislative Instrument and a marked-up compilation of the Principal Instrument showing the proposed changes on the Derivative transaction reporting webpage under the 'Upcoming Rules and Exemptions changes' section inviting comment on the proposals to a nominated email address.
12. ASIC has consulted with industry in relation to extending and modifying Exemption 1 (Exchange-traded derivatives). ASIC has also consulted with industry in relation to extending Exemption 3 (Name information) and Exemption 9 (FX Securities Conversion Transactions). In response, one association formally said they supported the above proposals and another association said that their members were broadly comfortable with the proposals.
13. ASIC has consulted with industry in relation to allowing Exemption 4 (Privacy – Consent for historical counterparties) and Exemption 5 (Privacy – Foreign privacy restrictions) to cease on 30 September 2020. The feedback ASIC has received supports removal of the blanket exemptions in favour of individual applications for relief as being the more appropriate solution.
14. ASIC has consulted with and received feedback from industry supporting removal of Exemption 6 (Privacy – Identifying information of government entities) and Exemption 8 (Collateral reporting) upon expiration. ASIC did not receive any feedback from industry objecting to removal of these exemptions upon expiration.
15. ASIC considered the feedback provided by these bodies, together with ASIC's regulatory objectives, in the final terms of the Legislative Instrument.

Operation of the instrument

Name

16. Section 1 of the Legislative Instrument provides that the instrument is the *ASIC Corporations (Amendment) Instrument 2020/827*.

Commencement

17. Section 2 of the Legislative Instrument provides that the instrument commences on the later of:
 - (a) 1 October 2020; and
 - (b) the day after it is registered on the Federal Register of Legislation.

Authority

18. Section 3 of the Legislative Instrument provides that the instrument is made under paragraph 907D(2)(a) of the *Corporations Act 2001*.

Schedules

19. Section 4 of the Legislative Instrument provides that each instrument that is specified in the Schedule to the Legislative Instrument, is amended as set out in the applicable items in the Schedule, and any other item in the Schedule has effect according to its terms.

Schedule 1 - Amendments

20. Item 1 of Schedule 1 repeals the definition of 'Identifying Information' from the Principal Instrument.
21. Item 2 of Schedule 1 repeals the definition of 'Relevant Foreign Jurisdiction' from the Principal Instrument.

Exemption 1 (Exchange-traded derivatives)

22. Item 3 of Schedule 1 amends section 5(1) of the Principal Instrument to extend the expiry date of 30 September 2020 until 30 September 2022 for Exemption 1.
23. Item 4 of Schedule 1 amends subsection 5(1) so that references to Derivatives that, for the purposes of conditional relief for Reporting Entities under Exemption 1:
- (a) are able to be traded (within the meaning of section 761A of the Act) on a Relevant Financial Market; and
 - (b) the entry into of the arrangement that is the Derivative takes place on the Relevant Financial Market,
- are removed from Exemption 1 of the Principal Instrument.
24. Item 5 of Schedule 1 repeals subsection 5(2) as it refers to ASIC Instrument [14/0952] which was repealed on 1 October 2015.
25. Item 6 of Schedule 1 makes consequential amendments to the Principal Instrument.
26. Item 7 of Schedule 1 substitutes the date '1 October 2020' with '1 October 2022', extending the date on when a Reporting Entity that relies on subsection 5(1) of Exemption 1 must start reporting certain information in accordance with the Rules.
27. Item 8 of Schedule 1 makes consequential amendments to the Principal Instrument.

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28. Item 9 of Schedule 1 makes amendments to the Principal Instrument that are consequential to the amendments made by item 10 of Schedule 1.
 29. Item 10 of Schedule 1 repeals subsections 5(4) and (5) so that the list of 'Relevant Financial Market' and clarification that a financial market that is a 'Relevant Financial Market' is not a 'Regulated Foreign Market' is removed from the Principal Instrument.

Exemption 3 (Name Information)

30. Item 11 of Schedule 1 amends subsection 7(1) of the Principal Instrument to extend the relief under Exemption 3 from 30 September 2020, until 30 September 2022.

Exemption 4 (Privacy – Consent for Historical Counterparties)

31. Item 12 of Schedule 1 repeals section 8 of the Principal Instrument which provides conditional relief from Rule 2.2.1 of the Rules to Reporting Entities in regards to reporting identifying information (names and identifiers) in relation to a Historic Reportable Position to a Trade Repository where certain circumstances occur at the time the identifying information is required to be reported. The exemption is due to expire on 30 September 2020.

Exemption 5 (Privacy – Foreign Privacy Restrictions Relief)

32. Item 12 of Schedule 1 repeals section 9 of the Principal Instrument which provides conditional relief from Rule 2.2.1 of the Rules for Reporting Entities in regards to reporting of identifying information (names and identifiers) in relation to a Reportable Transaction or Reportable Position to a Trade Repository where to do so would be a breach of the law or regulation in a Relevant Foreign Jurisdiction. The exemption is due to expire on 30 September 2020.

Exemption 6 (Privacy – Identifying Information of Government Entities)

33. Item 12 of Schedule 1 repeals section 10 of the Principal Instrument which had ceased effect on 30 September 2016.

Exemption 8 (Collateral Reporting)

34. Item 12 of Schedule 1 repeals section 11 of the Principal Instrument which had ceased effect on 30 October 2015.

FX Securities Conversion Transactions Relief

35. Item 13 of Schedule 1 amends section 13 of the Principal Instrument to extend the relief from Rule 2.2.1 of the Rules to the extent that Rule requires the Reporting Entity to report a Reportable Transaction or Reportable Position in a foreign exchange contract in specific circumstances, until 30 September 2022.

Record-keeping

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36. Item 14 of Schedule 1 amends section 14 of the Principal Instrument so that the record keeping requirements for the Exemptions are updated to reflect the other changes made to the Principal Instrument.

Legislative authority

37. The Australian Securities and Investments Commission (**ASIC**) makes the Legislative Instrument under paragraph 907D(2)(a) of the *Corporations Act 2001* (the **Act**). Under paragraph 907D(2)(a) of the Act, ASIC may exempt a person or class of persons from all or specified provisions of the Rules.
38. Under subsection 33(3) of the Acts Interpretations Act 1901 (as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Statement of Compatibility with Human Rights

39. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in Attachment A.

Attachment A

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Amendment) Instrument 2020/826

Overview

1. The Legislative Instrument is made under paragraph 907D(2)(a) of the Corporations Act 2001 and amends the *ASIC Corporations (Derivative Transaction Reporting Exemption) Instrument 2015/844* (**Principal Instrument**). The purpose of the Principal Instrument is to provide transitional relief from certain reporting requirements under the *ASIC Derivative Transaction Rules (Reporting) 2013* (**Rules**), for varying periods, to Reporting Entities. Most of the conditional exemptions are due to expire or have ceased. The Legislative Instrument extends and updates some of these conditional exemptions and repeals some conditional exemptions that are expiring on 30 September 2020 or have previously expired.
2. The Legislative Instrument also amends Exemption 1 in the Principal Instrument, by removing ‘Relevant Financial Markets’ as a category of financial markets for the purposes of the relief under Exemption 1 from Rule 2.2.1 of the Rules. Concurrently to this work, ASIC has undertaken an assessment of the financial markets that were identified in Exemption 1 as ‘Relevant Financial Markets’ and is amending the ASIC Regulated Foreign Markets Determination [OTC DET 13/1145] (**Determination Instrument**) to include those financial markets as a ‘Regulated Foreign Market’ where appropriate under Rule 1.2.4(3) of the Rules.
3. ‘Relevant Financial Markets’ for the purposes of Exemption 1 had been initially designed to supplement, on a time-limited basis, the Determination Instrument. The time -limited exemption applied while ASIC considered whether it was of the opinion that the specified financial markets were suitable to be determined as a ‘Regulated Foreign Market.’ Now that ASIC has undertaken this assessment and updated the Determination Instrument with additional financial markets categorised as ‘Regulated Foreign Markets’, the category of ‘Relevant Financial Markets’ is no longer required. The consequence of a financial market being determined by ASIC as a Regulated Foreign Market is that Derivatives entered into on the Regulated Foreign Market are not ‘OTC Derivatives’ under the Rules and do not need to be reported by Reporting Entities under the Rules.

Assessment of human rights implications

3. The Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

4. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.